

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

— — —

THE HONORABLE LEE H. ROSENTHAL, JUDGE PRESIDING

FIRE PROTECTION SERVICE, )  
INC. )

Plaintiff, )

v. )

NO. 4:19-CV-02162

SURVITEC SURVIVAL PRODUCTS, )  
INC., )

Defendant. )

STATUS CONFERENCE HELD REMOTELY  
OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Houston, Texas  
December 5, 2022

APPEARANCES:

For the Plaintiff: William Matney, Esq.

For the Defendant: Peter McLauchlan, Esq.  
Jeremy Gaston, Esq.  
David McLauchlan, Esq.

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Proceedings reported by computerized stenotype  
machine.

PROCEEDINGS

THE COURT: We're just waiting for Mr. Matney?

MR. MATNEY: Good morning, Your Honor. Scott Matney for the Plaintiff, Fire Protection Service.

THE COURT: Good morning. Is counsel for the defendant on?

MR. DAVID McLAUCHLAN: Yes. At least one of us here, David McLauchlan for Defendant Survitec Survival Products. I'm expecting my brother, Peter, to join the call and possibly --

THE COURT: Mr. Gaston?

MR. DAVID McLAUCHLAN: Mr. Gaston, yes.

THE COURT: All right. I see the other Mr. McLauchlan, and I think we're waiting for Mr. Gaston still.

MR. PETER McLAUCHLAN: Yes. Two are better than one.

MR. GASTON: Good morning.

THE COURT: All right. I think we're now all present, correct?

MR. GASTON: Yes, Your Honor.

THE COURT: All right. So this case is back from a remand from the Fifth Circuit before a different district judge. So we need a scheduling

1 order. This case never really proceeded beyond its  
2 threshold issues. Is that accurate?

3 MR. MATNEY: Your Honor, actually we were  
4 in the middle of trial; and the defendant filed a motion  
5 for partial summary judgment after the plaintiff rested;  
6 and that's what went up. So I guess technically here we  
7 are a couple of years and several hundred thousand  
8 dollars later still in the middle of trial. There is  
9 one issue that Your Honor might not be aware of; and  
10 that is prior to the trial and unbeknownst to us and  
11 Judge Atlas, the defendant had filed a second lawsuit  
12 alleging some of the things that it had asserted as  
13 affirmative defenses in this lawsuit. We were not aware  
14 of it until after the motion to dismiss in this lawsuit  
15 was granted, and our appellate timetable was about to  
16 expire; and then that was mentioned for the first time  
17 by Survitec to us in the vein of an offer of settlement.  
18 And so what we have now, that case is currently residing  
19 in Judge Bennett's chambers; but it's been --

20 THE COURT: He's got the lower number.

21 MR. MATNEY: Right. And it's been going  
22 on since January of 2021. I filed a 12(b) motion early  
23 on, and about a year later that was denied as moot  
24 because one of the many grounds had to do with some of  
25 their pleadings. They amended their pleadings, but

1 there still remained some substantive issues we had. So  
2 we filed another 12(b) motion. That has been pending  
3 for quite some time now.

4 We haven't filed an answer. There hasn't  
5 been a scheduling issue in that case, but my concern is  
6 for the sake of judicial economy and also to not have  
7 conflicting results that -- I don't want to fight this  
8 battle here against those defenses and then have to turn  
9 around and fight the battle again as a defendant when  
10 they're referring to the claimed defenses. So I was  
11 thinking maybe some sort of consolidation of those  
12 claims into this lawsuit might be appropriate.

13 THE COURT: Have you raised that before  
14 Judge Bennett?

15 MR. MATNEY: We have not, Your Honor. I  
16 guess my 12(b) motion has been pending, and we have a  
17 scheduling order that we submitted and has not been  
18 signed. That's been pending for quite some time.

19 THE COURT: All right. So what is the  
20 case number in his court?

21 MR. MATNEY: That would be Cause  
22 Number 4:21-CV-00312.

23 THE COURT: I've got the first filed, the  
24 related cases.

25 MR. MATNEY: Correct.

1 THE COURT: So under our usual method of  
2 proceeding, the case would be transferred from Judge  
3 Bennett to me and coordinated with the schedule for this  
4 case.

5 MR. MATNEY: That would be my  
6 understanding, Your Honor. Yes.

7 THE COURT: All right. So give me again  
8 his case number.

9 MR. MATNEY: Sure. It is 4:21-CV-00312.

10 THE COURT: All right. So we would  
11 transfer it to my court, and let's assume that we're  
12 going to enter the same scheduling order in both. What  
13 do you want to do? You were in trial, but tell me what  
14 the record looks like here.

15 MR. MATNEY: Well, as I said, we, the  
16 plaintiff, rested; and then they filed this motion.  
17 That's what eventually got granted. It went up. So  
18 there is a complete record for at least half of the  
19 trial. Since we've had some passage of time, there  
20 might be some damages that need to be updated.

21 THE COURT: Is that all? Is liability  
22 completely laid out in the record?

23 MR. MATNEY: We believe it is, Your Honor.  
24 I don't think there's really been a factual dispute as  
25 far as liability. The main dispute has been a legal

1 argument; and that is Survitec has maintained that the  
2 particular statute upon which we sued, it does not apply  
3 to them. They asserted that motion many times during  
4 Judge Atlas' trial or proceedings; and she denied it,  
5 you know, formally several times. So we don't really  
6 believe that liability is as much an issue; but like I  
7 said, there is some projections of economic damages that  
8 with the passage of two years might need to be updated  
9 for our portion of the case.

10 THE COURT: So how much does the plaintiff  
11 believe the case involves?

12 MR. MATNEY: Well, at a bare minimum,  
13 there is this buyback of equipment under the protection  
14 act; and that's probably in the nature of, you know,  
15 \$500,000 at this point; and then there's economic  
16 damages that could go into the millions of dollars, and  
17 it's --

18 THE COURT: You mean lost profits?

19 MR. MATNEY: Yeah. There's -- the statute  
20 forbids them canceling without cause and provides some  
21 sort of -- a certain number of days to cancel, which  
22 they did not comply with. And so we have an economic  
23 expert that has analyzed the accountings and projected  
24 what our lost revenue would have been as a result of --  
25 if we would have been able to continue to do business

1 with these guys as the dealer, and so that's a  
2 component. And then another component, strangely, not  
3 that the tail's wagging the dog, but they're also  
4 responsible for all costs; and in this case since we  
5 went up on appeal and everything else, our attorney's  
6 fees and our appellate fees are quite substantial at  
7 this time.

8 THE COURT: So total, what are you going  
9 to be asking a court or a jury to award?

10 MR. MATNEY: I would say we're looking at  
11 somewhere in the, you know, 5-to-7-million-dollar range.

12 THE COURT: And how many years of  
13 prospective business is that based on?

14 MR. MATNEY: Well, he does it in tiers; so  
15 there's like a couple of year of tiers. There's the  
16 history from when the termination happened to trial, and  
17 there's tiers for a couple of years out; and then he  
18 projects out to ten years, I think, from the full date  
19 of cancellation. So it's almost like an a-la-carte menu  
20 because the statute is not very clear in terms of what  
21 those damages would be considered as reasonable. So he  
22 did it in tranches, if you will, or groups.

23 THE COURT: Have the parties tried to  
24 resolve the case --

25 MR. MATNEY: Yes, Your Honor.

1                   THE COURT:  -- since it's been -- at this  
2 stage?

3                   MR. MATNEY:  Not since the appeal, no.  We  
4 did order -- we were ordered by Judge Atlas to be in  
5 front of Judge Caroline Baker; and we did so twice, I  
6 believe, and were -- excuse me -- not successful in  
7 reaching a settlement at that time.  But since the  
8 granting of their motion to dismiss and the appeal,  
9 there has not been any subsequent mediations.

10                  THE COURT:  Does it make sense to have one  
11 before we figure out how we're going to try the rest of  
12 the case and deal with what's already been tried?

13                  MR. MATNEY:  Certainly, Your Honor.  We're  
14 always willing to talk either in a formal or informal  
15 setting, for sure.

16                  THE COURT:  Is it likely -- is there  
17 sufficient likelihood that it would succeed to make it  
18 worth your time and money?

19                  MR. MATNEY:  I would hope so, but I guess  
20 we've never had a figure that we were -- thought would  
21 cover even our basis of the equipment that they're  
22 supposed to repurchase as well as our costs and fees;  
23 and those have only gone up.  So to me that's a question  
24 that's better posed to opposing counsel, because I don't  
25 feel like my clients are being unreasonable here; but we



1 just haven't gotten into a range that would even make  
2 financial sense for us to consider.

3 THE COURT: Let me hear from the other  
4 side.

5 MR. PETER McLAUCHLAN: Yes. Hi, Your  
6 Honor. Peter McLauchlan, lead counsel, along with David  
7 McLauchlan and Jeremy Gaston. Yes, Survitec would  
8 always be open to settlement discussions and mediations;  
9 and perhaps mediation could be accomplished sometime in  
10 the next two months; and if -- and we'd go back to Judge  
11 Baker, I think. She's very familiar with the case.

12 THE COURT: Or you could go to Judge  
13 Atlas.

14 MR. PETER McLAUCHLAN: Yes, I guess so.  
15 I'm not sure opposing counsel would like that. She  
16 ruled against them, but anyway we're open -- we're open  
17 to anyone.

18 THE COURT: Does it make sense to go back  
19 to Judge Baker? Have you talked about that with each  
20 other, schedules, anything of that nature?

21 MR. MATNEY: Your Honor, Scott Matney  
22 here. I don't have a problem with meeting in front of  
23 Judge Baker again. I thought she did as good a job as  
24 could be expected the last couple of times; and as  
25 Mr. McLauchlan pointed out, she's certainly familiar

1 with the case. To answer your second part of your  
2 question, no, we have not consulted her schedule or made  
3 attempts to schedule any mediation in front of her or  
4 anyone else.

5 THE COURT: All right. So in terms of  
6 discovery, is there more to be done, just to update  
7 damages? Is there an expert for that, or what are we  
8 looking at here?

9 MR. MATNEY: As far as our case-in-chief,  
10 I think that the discovery would really be focusing just  
11 on updating the damages for the -- per our expert  
12 report; but if we're taking over the other case, there  
13 are claims -- this is a trademark infringement claim --  
14 that they're asserting; and we do believe that our  
15 motion to dismiss is valid based on res judicata and  
16 collateral estoppel as well per single doctrine. So we  
17 think that that part of the case should be disposed of  
18 on legal grounds; but if that motion is denied or some  
19 subsequent summary judgment motion is denied, then, of  
20 course, we would probably need to do some discovery as  
21 it relates to their trademark claims; and that would  
22 focus -- as well as the likelihood of confusion on not  
23 only trademark elements but also would focus on --  
24 certainly on their damages model.

25 THE COURT: Response?

1 MR. PETER McLAUCHLAN: Yes, Your Honor.  
2 First off, Survitec does not agree that liability is  
3 uncontested. It is disputed, and there was no final  
4 ruling on at least one and perhaps two matter of law  
5 issues. For purposes of judicial economy, Survitec  
6 would not be opposed to consolidating the cases.

7 So that the Court understands, the other  
8 case is a trademark infringement claim, because part of  
9 the termination notice included instructions to FPS to  
10 not use Survitec's -- excuse me one second, Your Honor.

11 Sorry about that.

12 One of the main issues was to not use the  
13 logos and trademarks, and they have been used since  
14 termination. In fact, in some instances they're still  
15 being used. So that's kind of a very separate part of  
16 the case no matter what happens on the dealer  
17 termination aspect of it. So I just wanted the Court to  
18 be aware that it is -- they're connected but quite  
19 separate.

20 THE COURT: So are they -- are you in need  
21 of discovery on one case but not the other --

22 MR. PETER McLAUCHLAN: Yes.

23 THE COURT: -- the trademark case but not  
24 other parts?

25 MR. PETER McLAUCHLAN: Yes, exactly.

1 We're in the early stages of discovery in the trademark  
2 case; whereas in the dealer termination case, as  
3 Mr. Matney pointed out, there might need to be a slight  
4 update since time has passed; and instead of relying on  
5 projections from the plaintiff's expert we can look at  
6 real data, but then the defense portion of the case  
7 could commence. And the trademark portion of the case  
8 is really a separate animal because either way with  
9 respect to the dealer termination case, Survitec  
10 contends that there has been a trademark violation; and  
11 that needs to be addressed in this court or in Judge  
12 Bennett's court.

13 THE COURT: All right. You want to  
14 respond?

15 MR. MATNEY: Sure, Your Honor. And this  
16 kind of goes to the heart of our 12(b) motion, and that  
17 is right before the initial trial setting Defendant  
18 Survitec asserted -- tried to assert moot relief to  
19 assert these same claims as affirmative claims. It was  
20 right on the eve of trial; and so Judge Atlas denied  
21 that request but allowed them to assert similar type  
22 claims in the guise of affirmative defenses. So we did  
23 about three weeks of expedited discovery and then had  
24 the trial reset for a three- or four-week time period  
25 and then tried it in early February of 2021.

1           So, you know, as I said, our 12(b) motion  
2 hits on the fact that we bought items from them that  
3 they -- in trying to argue that they should not have to  
4 buy them back from us, as the statute we sued under  
5 requires, they said, "Well, you can still sell them."  
6 And so we have kind of smoking-gun documents that would  
7 take out any claim of trademark infringement under the  
8 first sale doctrine because we were -- we bought them as  
9 an authorized dealer. We still have them in stock. We  
10 can sell them, that sort of thing. But the parties  
11 despite the litigation were continuing to do business  
12 for years while the litigation was pending and still to  
13 this day, to some degree, do business; and it wasn't  
14 until they raised this issue on the eve of trial  
15 about -- complaining about our website that we noticed  
16 that they were still up there and pulled them off, and  
17 they haven't been up there since.

18           So, you know, yes, I understand that if a  
19 dispositive motion isn't granted, then there will be the  
20 need for some discovery on their trademark claims; but  
21 our position is that those are kind of a  
22 dead-on-arrival-type situation.

23           THE COURT: So it sounds like the best  
24 thing to do would be for you guys to, as efficiently and  
25 cheaply as possible, update damages and any different

1 legal issues based on the trademark claims that  
2 apparently have not been discovered but may not be  
3 materially different in the elements to either liability  
4 or damages than the claims that have been the subject of  
5 some ongoing exchange of information.

6 And then it makes sense -- so if the cases  
7 both come before me, it makes sense for you guys to go  
8 mediate as quickly as possible once you exchange updated  
9 damages information and the defenses or limitations to  
10 any of the elements of damages.

11 MR. MATNEY: That makes sense, Your Honor.

12 THE COURT: And so what I would propose  
13 that you do is by -- let's see -- December -- and I  
14 don't know how quickly you can update the information  
15 that you've already begun to exchange; but if you could  
16 do it by -- actually let's say January 13th, go to  
17 mediation by February 3rd. And I would contact Judge  
18 Baker's scheduling person promptly to get on her books,  
19 and if you -- and I would go to mediation before you get  
20 a ruling on the outstanding legal issues. You've got a  
21 very good -- you've got a much better sense than I can  
22 reliably deliver you an opinion for what the exposures  
23 and benefits, both strengths and weaknesses, of the  
24 motion arguments are. I don't think you need to wait  
25 for me.

1 MR. MATNEY: Understood.

2 THE COURT: So mediate. And if you're  
3 unable to get the case resolved in mediation, I'm going  
4 to set you for a hearing on February 10 by Zoom at  
5 10:00 a.m.; and we'll see what we need to do.

6 MR. MATNEY: Sounds like a good plan, Your  
7 Honor.

8 THE COURT: All right. I think we have  
9 a -- the schedule is fixed then.

10 MR. PETER McLAUCHLAN: Thank you, Your  
11 Honor.

12 MR. MATNEY: Thank you, Judge.

13 MR. GASTON: Thank you.

14 THE COURT: You're welcome. Thank you.

15 (Proceedings concluded.)

16 \* \* \* \* \*

17 I, Mary Nancy Capetillo, certify that the foregoing  
18 is a correct transcript from the record of proceedings  
19 in the above matter.

20 January 30, 2023

21 /s/MaryNancyCapetillo  
22 Signature of Court Reporter  
23  
24  
25